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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CITY OF FERNLEY, a political subdivision of the State of Nevada; DAVID F. STIX, JR., an individual; and DEANNA EDMONSTON, an individual, Plaintiffs, vs. ERNEST A. CONANT, Regional Director, UNITED STATES BUREAU OF RECLAMATION; UNITED STATES BUREAU OF RECLAMATION; and PYRAMID LAKE PAIUTE TRIBE, Defendants.	Case Number: CV-00119 **CITY OF FERNLEY'S FRCP 59(e) MOTION TO ALTER OR AMEND JUDGEMENT**

Plaintiff, City of Fernley ("Fernley"), by and through its counsel of record, Paul G. Taggart, Esq. and David H. Rigdon, Esq., of the law firm Taggart & Taggart, LTD., hereby file this FRCP 59(e) Motion to Alter or Amend this Court's December 13, 2021 Order and Judgment. The Motion seeks to have the Court amend its Order and Judgment to an order of dismissal without prejudice and with leave to amend. This Motion is based on the following Memorandum of Points and Authorities, all pleadings and papers on file in this matter, and any oral argument the Court may, in its discretion, elect to entertain.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Dismissal with prejudice and without leave to amend is a "harsh penalty" that should only be imposed in "extreme circumstances."[1] Fernley brought its case in this Court in good faith and as a result of the very real harms it will face as a result of the Federal Defendants' proposed project. In bringing this case Fernley was not making frivolous claims without factual support or otherwise pursuing an improper purpose like delay or harassment. Rather, Fernley has legitimate claims under federal and state law and brought those claims in the only forum available to it. Simply put, the extreme circumstances that usually warrant a dismissal with prejudice are not present in this case.

There is no question that the Truckee Canal Extraordinary Maintenance Project will cause harm to the Fernley groundwater aquifer and the citizens who rely on it. The Court takes Fernley to task for describing these harms in 'economic' rather than 'environmental' terms. But that perceived error does not warrant dismissal with prejudice, it warrants dismissal with leave to amend. By dismissing the case with prejudice and denying leave to amend, the Court has left Fernley without any effective remedy.

Fernley is a fundamentally different entity than the plaintiffs in the *Duval* case relied upon by the Court. Those plaintiffs were private companies whose only *raison d'etre* is economic gain. By contrast Fernley is a governmental entity that was formed for the express purpose of promoting the general health, safety, and welfare of its citizens. Included within this mandate is a responsibility to protect the natural resources within its jurisdiction that those citizens rely on. Rather than *Duvall*, which the court found was only "analogous" to the present case, the Court should have relied on *Churchill Co.* a case with exactly similar plaintiffs who were also alleging harm to the groundwater aquifer which supplies them with water.

The Court determined that leave to amend will be futile based solely on its contention that because Fernley pumps water from the aquifer, it is impossible for it to allege any non-economic harm

[1] *Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000); *Raiford v. Pounds*, 674 F.2d 944, 945 (9th Cir. 1981) (citing *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970).

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to the environment. This determination effectively denies standing to every town, city, and county in Nevada that operates a water system to bring a NEPA/APA action against a federal project that impacts its water supplies. But that is exactly the opposite of what the Ninth Circuit held in the *Churchill Co.* case when it acknowledged that both Churchill County and the City of Fallon (who operate municipal water systems that rely on the groundwater aquifer) had prudential standing to bring a NEPA/APA challenge against a federal government project.

The Court also dismissed Fernley's declaratory relief claim under the guise of declining to exercise supplemental jurisdiction over state law claims. This ignores the fact that Fernley brought its declaratory relief action under the jurisdiction of a federal law – the APA. Section 702 of the APA expressly vests this court with primary jurisdiction to hear complaints and issue non-monetary relief against federal agencies who exceed their authority. The Federal Defendants unlawful and extra-jurisdictional determination of a matter of state law (whether Fernley has a right to continued recharge) is exactly the type of action Section 702 was designed to provide a remedy for.

Given the punitive nature of the Court's Order and Judgement, and the injustice that dismissal of this case with prejudice will impose on Fernley and its citizens, Fernley respectfully requests the Court amend the Order and Judgement in a manner that grants Fernley leave to amend its complaint. A draft of a proposed amended complaint is attached hereto as Exhibit 1.

STANDARD OF REVIEW

FRCP 59(e) authorizes a party to request a Court amend or alter its final judgment in a matter if the request is filed within 28 days after entry of the judgment. A district court enjoys considerable discretion in granting or denying an FRCP 59(e) motion.[2] There are four independent grounds under which an FRCP 59(e) motion may be granted: (1) if necessary to correct manifest errors of law or fact upon which the judgment rests, (2) there is newly discovered or previously unavailable evidence, (3) if

[2] *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

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the judgement will result in a manifest injustice, or (4) if there has been an intervening change in controlling law.[3] Here, both the first and third conditions warrant the requested amendment.

The Court's dismissal of the case with prejudice and without leave to amend is manifestly unjust and leaves Fernley with no effective remedy. The Ninth Circuit has made clear that leave to amend "shall be freely given when justice so requires" and that "[t]his policy is to be applied with extreme liberality."[4] "Dismissal is a harsh penalty" and should be imposed "only in extreme circumstances."[5] "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment."[6] "Especially when a case is still young, a district court must consider . . . less drastic alternative sanctions before dismissing."[7]

Here, the Court's finding that amendment of Fernley's complaint would be futile, was based on application of the holding in the *Duvall* case,[8] which applied to private for-profit companies not to the City of Fernley, a general law city and political subdivision of the State of Nevada.

ARGUMENT

I. The City of Fernley is in exactly the same position as the plaintiffs in *Churchill Co. v. Babbit* and is not "analogous" to the plaintiffs in *Duvall Ranching Co. v. Glickman*.

Fernley's status and position is exactly the same as that of the plaintiffs in *Churchill Co. V. Babbit*[9] whom the Ninth Circuit determined did have prudential standing under similar circumstances. The plaintiffs in *Churchill Co.* were Churchill County and the City of Fallon. Like Fernley, Churchill County and Fallon are political subdivisions of the State of Nevada. Also, like Churchill County and Fallon, Fernley owns and manages lands within the same watershed as the proposed federal project that will be affected by the construction of the project.[10] In addition, just like the federal project at issue in

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[3] *Id*.
[4] *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).
[5] *Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000); *Raiford v. Pounds*, 674 F.2d 944, 945 (9th Cir. 1981) (citing *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970).
[6] *Id*.
[7] *Raiford v. Pounds*, 674 F.2d 944, 945 (9th Cir. 1981) (internal quotations and citations omitted).
[8] *Duvall Ranching Co. v. Glickman*, 965 F.Supp. 1427 (D.Nev. 1997).
[9] *Churchill Co. v. Babbitt*, 150 F.3d 1072 (9th Cir. 1998) (Opinion amended and superseded on denial of reh'g, 158 F.3d 491 (9th Cir. 1998), and abrogated on other grounds by *Wilderness Soc. V. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).
[10] *Id*. at 1079.

Churchill Co, the EIS for the instant project "noted likely adverse effects on the County and City's groundwater levels and quality" that "have not been studied at all."[11]

In its order, the Court states that neither it nor the parties identified any case that "is precisely on point."[12] However, the Court found that *Duvall* was the most "analogous" to the instant case because in *Duvall* Judge Reed found the plaintiffs could only assert 'economic' interests in the springs in question, not 'environmental' interests.[13] But this reasoning ignores a fundamental factual difference between the *Duvall* plaintiffs and Fernley.

As Judge Reed noted, the *Duvall* plaintiffs "are just what their names imply – companies."[14] In other words, private for-profit entities whose only purpose is the pursuit of economic gain for their owners. This is why they could only assert 'economic' interests in the springs, because they are purely economic entities.[15]

By contrast, the City of Fernley is also exactly what its name implies – a city. More precisely, it is a not-for-profit municipality organized as a political subdivision of the State of Nevada which has both the power and obligation to provide for the general health, welfare, and safety of its citizens.[16] This includes the power and obligation to advocate for and take actions to ensure the continued health of the natural environment in and around the city. Unlike the plaintiffs in *Duvall*, Fernley is not a purely economic entity interested only in private gain. Rather it is a governmental entity with general police powers.

Notably, just as occurred in *Duvall*, when *Churchill Co.* was before the district court Judge Reed ruled that the plaintiffs lacked standing to bring their NEPA claim.[17] However, unlike *Duvall*, the Ninth Circuit overturned Judge Reed's determination and reversed on appeal. In doing so, the Ninth Circuit held that:

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[11] *Id*.
[12] Order at 11:1-5.
[13] *Id*. at 11:5-12.
[14] *Duvall Ranching Co. v. Glickman*, 965 F.Supp. 1427, 1441 (D.Nev. 1997)
[15] *Id*.
[16] *See generally* NRS Chapter 266 (General Law For Incorporation Of Cities And Towns) (NRS 266.010 specifically grants Fernley and other cities "the right of home rule and self-government").
[17] *Id*. at 1076-77 (emphasis added).

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> [The] County's and City's threatened land interests fall within the zone of interests of NEPA. We have previously held that the protection of the environment falls within NEPA's zone of interests. Appellants assert that the environmental health of their lands *and water supply* is threatened by Defendants' action. Their threatened interest falls within NEPA's interest in preventing harm to the environment.[18]

Fernley's interest in the environmental health of its water supply (the Fernley groundwater aquifer) is, therefore, the same as the interest asserted by both Churchill County and the City of Fallon – that of a municipal entity charged with safeguarding the lands and environment within its boundaries and protecting the health, safety, and welfare of its citizens. As recognized governmental entities Fernley, Churchill County, and Fallon all have far more than a mere 'economic' interest in their respective groundwater aquifers.

A dismissal with prejudice would jeopardize the City's groundwater resource. This is more than a mere economic issue, this is an environmental issue for all of Fernley's water supply and the residents that rely on this water for their day-to-day lives.

Secondarily, the Court also relied on two Ninth Circuit cases[19] that denied standing to trade associations and reasoned that Fernley was "somewhat similarly situated" to them.[20] The Ninth Circuit properly denied standing in those cases because, as their names imply, those trade associations were merely amalgamations of private economic actors like the companies in *Duvall*. However, just as Fernley is not a private, for-profit economic actor, it is also not a trade association that represents a group of private actors. Instead, as noted above, Fernley is a general-purpose governmental entity which has at its disposal the full suite of police powers allocated to all cities and counties in Nevada. This includes the power to regulate the lands within its boundaries to enhance the quality of the natural environment.

Finally, the Court notes that "Fernley and Intervenors are not, for example, environmental groups whose mission is to protect the groundwater."[21] Here, the Court is correct – Fernley is not a private environmental advocacy organization pursuing a specific mission. Instead, Fernley is an official

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[18] *Id*. at 1081 (emphasis added, internal citation omitted).
[19] *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. V. U.S. Dept. of Agric.*, 415 F.3d 1078 (9th Cir. 2005) & *Nevada Land Action Ass'n v U.S. Forest Serv.*, 8 F.3d 713 (9th Cir. 1993).
[20] Order at 11:15-18.
[21] Order at 19:17-19.

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governmental entity with an elected leadership that has been delegated general police powers by the State Legislature for the express purpose of protecting and preserving the health, safety, and welfare of its citizenry. This naturally includes a mandate to protect and preserve the natural environment in and around the city that its citizens rely on. In other words, Fernley has a higher responsibility to preserve and protect its natural environment than private environmental advocacy groups which have no official legal mandate or obligation to do so.

Accordingly, the Court should amend its Order and Judgment and grant Fernley leave to amend its complaint to provide the specificity the Court found lacking with respect to the environmental harms that this project will inflict.

II. Granting Fernley leave to amend will not be futile.

The Court and Defendants chastised Fernley for focusing its complaint primarily on economic interests rather than environmental ones. This perceived deficiency is best addressed by allowing Fernley leave to amend its complaint rather than dismissing the complaint with prejudice.

In its opposition brief, Fernley identified environmental harms that will result from construction of the project (loss of phreatophyte vegetation, land subsidence, etc.). At the hearing, in response to a question from the Court, counsel for the Federal Defendants conceded that had these harms been explicitly pled in Fernley's complaint, Fernley would have prudential standing to bring its NEPA/APA claim. Despite this concession, the Court determined that any such amendments would be futile. Fernley asserts that an amendment that the Federal Defendants conceded would correct the perceived deficiency should be allowed.

To make its finding that amending the complaint will be futile, the Court relies primarily on the way Fernley characterized is alleged harms.[22] But the whole point of requesting leave to amend a complaint is to correct any such deficiencies or mischaracterizations. In addition, simply because Fernley is an entity that relies on groundwater pumping does not, by itself, render it unable to plausibly allege harm to the environment. As noted above, Fernley is a municipal government entity that provides

[22] Order at 18:8-11.

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a wide variety of services to its citizens. One of those services is the provision of municipal drinking water. However, just because Fernley operates a municipal water system does not disqualify it from alleging other environmental harms that are within the scope of its jurisdiction and that will affect its lands and citizens.

The *Churchill Co.* case illustrates this point. Like Fernley, both Churchill County and Fallon operate municipal water systems and alleged harm to their water supplies. However, that did not disqualify them from also alleging environmental harms. As noted by the Ninth Circuit, both Churchill County and Fallon "assert[ed] that the environmental health of their lands *and* water supply is threatened by Defendants' action."[23] And the Ninth Circuit found that *both* of these asserted interests "falls within NEPA's interest in preventing harm to the environment."[24]

If Churchill County and the City of Fallon were able to draft a complaint in a manner that the Ninth Circuit found met the NEPA's prudential standing requirement, so can Fernley, a plaintiff of the same character in an almost identical situation.

Attached as Exhibit 1 to this motion is a draft of an amended complaint that Fernley believes appropriately resolves the issue of prudential standing and alleges specific environmental harms as well as the harms to its water supply. Fernley respectfully requests the Court amend its order and grant Fernley leave to file the amended complaint.

III. The Court should allow Fernley to amend its declaratory relief claim.

The Court couched its dismissal of Fernley's declaratory relief claim as a declination to exercise supplemental jurisdiction. However, as noted at the hearing, Fernley brought its declaratory relief claim under the APA which provides this Court has primary, not supplemental, jurisdiction over the claim.[25] Section 702 of the APA expressly states that:

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[23] *Churchill Co. v. Babbitt*, 150 F.3d 1072, 1081 (9th Cir. 1998) (Opinion amended and superseded on denial of reh'g, 158 F.3d 491 (9th Cir. 1998), and abrogated on other grounds by *Wilderness Soc. V. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

[24] *Id*.

[25] Complaint at 1:24-26 (Plaintiff seeks declaratory and injunctive relief under the Administrative Procedures Act ("APA), 5 U.S.C. §702 and §706(2)(A)").

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled to judicial review thereof.* An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority *shall not be dismissed nor relief therein be denied* on the ground that it is against the United States.[26]

This waiver of sovereign immunity and grant of jurisdiction is broad and "eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity."[27]

Here, Fernley properly alleged that the Federal Defendants (1) took an action (the issuance of an environmental impact statement and record of decision in which they exceeded their lawful authority by deciding an issue of state law that was wholly outside their jurisdiction), (2) in their official capacity (Fernley sued both the agency and its regional director in his official capacity), and (3) under the color of legal authority (the environmental impact statement and record of decision were issued by Federal Defendants as official and final decisions of the agency).

There is no question that in the environmental impact statement Federal Defendants determined that "the City of Fernley has no legal entitlement to the continued existence of seepage water from the Truckee Canal."[28] There is also no question that Fernley's claim to continued recharge arise under state law[29] and that, pursuant to Section 8 of the Reclamation Act of 1902, Reclamation must "proceed in conformity with [state water] laws."[30] In other words, Reclamation has no authority to independently adjudicate or make determinations related to water rights in Nevada or any other state. But that is precisely what Federal Defendants did in this case.

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[26] Emphasis added.
[27] *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C.. Cir. 1984).
[28] Final Environmental Impact Statement – Truckee Canal Extraordinary Maintenance at 3-17 (September 2020).
[29] *See* Complaint at 15:5-16:15 (outlining the alternative legal theories supporting Fernley's claim); *See also Ryan v. Gallio*, 52 Nev. 330, 286 P. 963, 968 (1930) (in which the Nevada Supreme Court expressly recognized and acknowledged the existence of the implied dedication doctrine alleged in ¶116 of Fernley's complaint.).
[30] Section 8 is codified at 43 U.S.C. §383.

In their reply brief, Federal Defendants wrongly asserted that Fernley's complaint "does not allege an *ultra vires* act or failure to act" that would allow Fernley to rely on Section 702.[31] This ignores the fact that the complaint explicitly referenced the Bureau's unlawful determination,[32] and alleged that this action "formed the basis for BOR's failure to adequately evaluate impacts to the ground water aquifer from the proposed project."[33] However, even if the allegation was not as explicit as the Court would have preferred, the remedy is to allow Fernley leave to amend, not dismissal with prejudice. The amended complaint attached as Exhibit 1 clarifies and makes explicit the *ultra vires* act committed by Federal Defendants (the unlawful and extra-jurisdictional determination of a matter of state law) and also makes clear that the relief requested is reversal of that act.

Nor is Fernley asking this Court to recognize a "novel Nevada water-law right."[34] The existence of the implied dedication doctrine has been recognized by the Nevada Supreme Court since 1930[35] and has been applied in other western states.[36] In fact, the doctrine has been described in a well-respected treatise as "an established principle" in the law.[37] Just because this is the first instance where the doctrine is directly applicable in Nevada, does not mean that the doctrine itself is novel.

The Court appears concerned with being asked to interpret and apply a doctrine of state law in this admittedly unique circumstance. However, federal courts regularly apply doctrines of state law and have full jurisdiction to do so where appropriate.[38] Here, the Court has the jurisdiction and obligation to hear Fernley's declaratory relief claim under APA §702. Fernley has no other forum in which it can

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[31] Federal Defendants Reply at 10:6-7.
[32] Complaint at 14:25-27.
[33] Complaint at 15:1-4.
[34] Order at 16:17-19.
[35] *Ryan v. Gallio*, 52 Nev. 330, 286 P. 963, 968 (1930) (citing Wiel on Water Rights (3d Ed.) vol. 1 §60).
[36] *See e.g. Chowchilla Farms, Inc. v. Martin*, 25 P.2d 435 (Cal. 1933) ("we feel warranted in holding that a water course, although originally constructed artificially, may from the circumstances under which it originated and by long-continued use and acquiescence by persons interested therein become and be held to be a natural water course."); *Hollett v. Davis*, 54 Wash. 326, 332-3, 103 P. 423, 426 (Wash. 1909) ("The proprietor of a stream, by diverting it into an artificial channel, and suffering it to remain in its changed condition for a period of time exceeding the statute of limitations, is estopped as against a person making a beneficial use of the water from returning it to its natural channel to that person's loss and injury.").
[37] 1 Weil, Water Rights in the Western States §60 at 59-60 (3d ed. 1911).
[38] 28 U.S.C. §1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."). *See e.g. U.S. v. Alpine Land & Reservoir Co.*, 510 F.3d 1035 (9th Cir. 2007) (applying Nevada's state law doctrines of water right forfeiture and abandonment).

litigate its claims. Accordingly, Fernley respectfully requests the Court amend its Order and Judgment and grant Fernley leave to file the proposed amended complaint.

CONCLUSION

For the reasons stated above, Fernley respectfully requests this Court amend its December 13, 2021, Order and Judgment to grant Fernley leave to amend its APA/NEPA and declaratory relief claims.

Respectfully submitted this 10th day of January 2022 by:

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing via the Court's electronic filing services, to the parties listed below.

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DATED this 10th day of January 2022.

/s/ Nicholas A. Tovar
Employee of TAGGART & TAGGART, LTD.

EXHIBIT INDEX

Exhibit	Description	Pages
1.	Draft First Amended Complaint for Declaratory and Injunctive Relief	20

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